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No. 82-5

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE NEW YORK TIMES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 388

THE ERIE STONE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether the court below erred in holding that, for percentage depletion purposes under Section 114(b)(4)(A) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.) 114), certain mineral deposits of the taxpayers are "dolomite" (for which the percentage rate of depletion is ten percent) rather than "metallurgical grade limestone" or "chemical grade limestone" (for which the depletion rates are fifteen percent). Dolomite is distinguishable from other stones by its richness of magnesium carbonate content (R. 399a). It was added to the list of minerals subject to percentage depletion simultaneously with chemical and metallurgical grade limestone (as well as several other minerals), in recognition of the fact that it is a magnesium compound.

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See Section 319 of the Revenue Act of 1951, c. 521, 65 Stat. 452; S. Rep. No. 781, 82d Cong., 1st Sess., p. 38 (1951–2 Cum. Bull. 458, 485). At the same time, Congress indicated that the mineral classifications were intended to have their "commonly understood meaning" and, recognizing that there was some overlapping in the statutory mineral classifications, that the specific classification should control over the more general classification. H. Conf. Rep. No. 1213, 82nd Cong., 1st Sess., p. 77 (1951–2 Cum. Bull. 622, 630).

In the trial court, the taxpayers conceded that the deposits in issue were dolomite (see R. 375a, 377a), but contended that they should nevertheless be classified as chemical or metallurgical grade limestone. The district court concluded (1) that the evidence showed that dolomite and limestone are commercially considered to be different minerals and that the deposits involved in this case were dolomite within the commonly understood commercial meaning of the term; (2) that, even if dolomite were generally considered as a type of limestone, there was no proof that petitioner's dolomite was usable for general metallurgical and chemical purposes although it might possibly be used for certain metallurgical or chemical purposes; and (3) acceptance of the taxpayer's contention would nullify the separate statutory classification of dolomite (R. 373a–381a; 181 F. Supp. 942). The court of appeals affirmed on factual grounds, with one judge dissenting (Pet. A–10 to A–50).

We submit that there is no occasion for further review of this case. The decision below is correct; it is

in accord with the Seventh Circuit's more recent opinion in a substantially identical case, *Vulcan Materials Co. v. Sauber*, decided June 25, 1962 (10 A.F.T.R. 2d 5005); there is no conflict;[1] and the issue involved is not relevant under the 1954 Code, since Section 613 (b)(6) prescribes the same percentage rates of depletion, dependent upon the purpose for which they are sold or used, for both dolomite and limestone of all grades.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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SEPTEMBER 1962.

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[1] Petitioners suggest that the decision below conflicts with *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (C.A. 6). As the district court's opinion, however, shows, there is no conflict with *Wagner*. Moreover, there cannot possibly be a conflict of circuits, for both this case and *Wagner* were decided by the same district judge and affirmed by the Sixth Circuit.